Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

ANDREW P. MOORE, II

Petitioner-Plaintiff,

v.

JOHN E. POTTER, POSTMASTER GENERAL and SUCCESSORS in his official capacity;
LOCAL 318,
NATIONAL POSTAL MAILHANDLERS UNION

Respondents-Defendants.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Was the Eleventh Circuit divested of its jurisdiction to review the district court orders and judgments before it on appeal in this case when the district court failed or refused to honor the required Federal Rules of Civil Procedure 54(b) certification?

II. Were the actions/decisions of the Eleventh Circuit and district court during the five-year delay of this case so harmful and violative of Petitioner's legal, Civil, and Due Process Rights under the Constitution of the United States that this Court should exercise its power of supervision to (a) vacate or order vacature of the lower courts' decisions and remand this case for trial or alternatively (b) in the interest of justice and to expedite this case, should the Court order summary judgment in favor of the Petitioner who satisfied his required summary judgment burden where Respondents did not meet their same required burden?

PARTIES

The names of all parties to this proceeding are contained in the caption of this case. Petitioner is an individual, not a corporate entity. See this Court's Rules 14.1(b) and 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petition for a writ of certiorari to review the orders of the United States Court of Appeals for the Eleventh Circuit in this case, and the orders and judgments of the United States District Court for the Middle District of Florida that were before the Eleventh Circuit on appeal which dismissed same.

OPINIONS BELOW SOUGHT FOR REVIEW

The orders of the court of appeals that give rise to the questions presented refer to civil case, *Andrew P. Moore, II v. William J. Henderson, Postmaster General & Successors, U.S. Postal Service; Local 318, National Postal Mailhandlers Union,* Appeal Case No. 00-11449-HH (hereinafter *Moore v. Postmaster General et al.*), and are reproduced in the appendix. (App. at 1-8). The relevant district court orders that give rise to same questions refer to *Moore v. Postmaster General et al.*, consolidated Case Nos. 3:97-cv-531-J-20C, 3:97-cv-613-J-20C, 3:98-cv-120-J-20C, 3:98-cv-393-J-20A, and are reproduced in the appendix. (App. at 9-40).

JURISDICTION

The order of the court of appeals dismissing appeal of the district court orders was filed on December 13, 2001. A timely petition for rehearing (referred to by court of appeals as a motion for reconsideration) was denied by order dated March 13, 2002. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional provisions involved in this case, the Seventh Amendment and Due Process clause of the Fifth Amendment of the United States Constitution, are set forth in the appendix. (App. at 41). The pertinent statutory provisions, 28 U.S.C. 1291, 1651, 2106, FRAP 4(a)(7), and Rules 21, 38(a)(b), 39, 56(e), 58, & 60(b)(3)(4) of the Federal Rules of Civil Procedure are set forth in the appendix. (App. at 42-47).

STATEMENT OF THE CASE

This case was brought by Petitioner asserting claims for wrongful discharge, discrimination, retaliation, and violations of constitutional rights against Respondent Postmaster General and Suc-cessors, in his official capacity under Title VII, Civil Rights Act of 1964, as amended, (Civil Rights Act of 1991), and under the Constitution of the United States, respectively. Petitioner also asserted so-called "hybrid" breach of contract/duty of fair representation claims (hereinafter "BOC/DFR" claims) against both Respondents under the National Labor Relations Act (hereinafter "NLRA). The district court had subject matter jurisdiction pursuant to 28 U.S.C. 1331, 1337(a), 1339, 1343, 1391(b)(c)(e), 29 U.S.C. 185(a), 39 U.S.C. 409(a), 1208 (b)(c)(d)(e), 1209(c), and 42 U.S.C. 2000e-5.

Petitioner is a naturally born citizen of the United States and a disabled American veteran with over twenty-two years federal service who is presently employed with the U.S. Postal Service as a mailhandler

which is a job position he has held for almost fourteen years. Petitioner's employment is under contract entered by the Postal Service (hereinafter "USPS") and the National Postal Mailhandlers Union. From the year 1994 through 1996, Petitioner legally participated in protected EEO activity and opposition to discrimination which included filing EEO complaints, union grievances, and NLRA charges against the USPS.

The USPS terminated Petitioner's employment in August of 1996 after he refused to sign his signature to consent to a mental examination, unknown medical treatment, and consent to paying for the exam & treatment and authorize release of his medical records. Petitioner seeks damages & relief for, inter alia, loss of income, a ruined credit rating, loss of almost all his personal belongings, the loss of a home-based small business, and damage to reputation. At the time of his discharge, Petitioner had compiled an unblemished disciplinary record. The claims asserted also involve the decision of the USPS to order Petitioner to submit to a physical examination and forced drug test in 1998 absent any probable cause after Petitioner appealed his discharge to the U.S. Merit Systems Protection Board (hereinafter "MSPB") which found that the USPS had unjustifiably terminated Petitioner's employment and ordered it to reinstate him within 20 days retroactively to the date of termination.

Petitioner passed the exam, and the results of the drug test were negative. The USPS refused to comply with order of the MSPB to reinstate Petitioner within 20 days and did not reinstate him until after 100 days. To this day, USPS has refused to compensate Petitioner overtime pay lost during his two years absence from his employment which resulted from the termina-

tion – the amount of which exceeds $100,000 including interest. The BOC/DFR claims asserted against Respondent Postmaster General involves the USPS' breach of the provisions of Article 2 of the collective bargaining agreement, (herein "CBA"), which prohibits discrimination based on an employee's race and other factors, Article 16.1, which prohibits disciplinary action or discharge of an employee except for just cause, and Articles 2.2, 5, 14.1, 14.2, 15.2(a)(b), 15.2(j), 16.1, 16.7, 19.1, and 31.3.

The BOC/DFR claims asserted against Respondent Local 318 involves its decision to deny Petitioner union representative upon his request for a union representative to be present at a scheduled pretermination meeting for which Local 318 knew might result in Petitioner's termination. The BOC/DFR claims asserted further involves Local 318's failure to make any effort to reschedule another meeting to ensure Petitioner had representation; its failure to conduct a minimum investigation regarding incidents of fraud committed by USPS who erased the contractual violations ascribed to it in Petitioner's grievances, changed and distorted the genuine issues, switched identification numbers on the grievances, then decided on such basis that the grievances did not involve any issues that may be of general application. Local 318 concurred with USPS' decision and refused to further process Petitioner's grievances although it was fully aware that USPS' conduct was in violation of the CBA.

Petitioner's BOC/DFR claims further asserted that Local 318, inter alia, agreed with USPS' false statements that it had provided all requested information to the union regarding Petitioner's grievances, and that Local 318 engaged in fraudulent conduct toward

Petitioner when it changed the identification numbers and status of one of his grievances from a disciplinary to a contractual status, changed the classification of 3 of his grievances, and made false statements suggesting that USPS did not take any disciplinary action against Petitioner, and that he did not lose any pay.

Petitioner appended over 75 pages of documentary evidence to his civil complaints as proof in support of the factual allegations in his claims including evidence showing that he exhausted all required administrative EEOC and NLRA remedies before filing suit against the Respondents. Petitioner sought relief and damages as well as declaratory & injunctive relief in all four cases.

The record of this case became voluminous due to the district court's consolidation of the four actions and because of many motions to compel/for sanctions Petitioner was prompted to file which shall be elaborated upon later in this petition to avoid redundancy. Combined, the suits contained seventeen (17) claims.

PROCEEDINGS BELOW

From June 26, 1997 through July 17, 1997, Petitioner filed applications for default and default judgment in district court against the Respondents who failed to file a responsive pleading or otherwise defend against the suit as required by law after being duly and properly served with same. [Doc.#9, 10, 15, 16, 17] ("Doc." Refers to the docket entry indicated on the district court's civil docket sheet).

During the proceedings, Respondents and their attorneys repeatedly filed false, tardy, incomplete or no answers at all to Peitioner's discovery requests and en-

engaged in other acts of fraud and misconduct which prompted Petitioner to file numerous motions. Such motions and Respondents' responses to them added to an already voluminous record and caused a congestion of the court's docket. The district court invariably denied most if not all of Petitioner's motions.

On November 6, 1997, the district court, sua sponte, consolidated case 3:97-cv-531-J-20C and 3:97-cv-613-J-20C, [Doc.#57]. Those cases were initially filed on May 5, 1997 and May 19, 1997, respectively. On March 27, 1998, case 3:98-cv-120-J-20C, which was initially filed on February 6, 1998, was also consolidated, sua sponte, with the previous two cases, [Doc.#84]. On October 19, 1998, the court set the deadline for parties to file dispositive motions and respond to same to November 13, 1998 and December 7, 1998, respectively. [Doc.# 164].

In October and November, 1998, all three parties moved for summary judgment. On or about November 13, 1998, Petitioner filed a partial motion for summary judgment against both Respondents. [Doc.#169, 176 thru 185]. Only Local 318 filed a response to the motion; Respondent Postmaster General failed to file any response. On or about December 7, 1998, Petitioner filed a counter-motion for summary judgment in response which thoroughly refuted the assertions in both Respondents' motions for summary judgment..

On January 21, 1999, the district court, sua sponte, consolidated case 3:98-cv-393-J-20A, which was filed on April 27, 1998, with the previous three cases, extended the discovery deadline to August 31, 1999, and extended the deadline for all parties to file dispositive motions to September 30, 1999. Such

consolidation by the court prompted petitioner to amend and supplement his previous motions for summary judgment. On September 24, 1999, Respondent Postmaster General filed an amended motion for summary judgment. On September 30, 1999, Petitioner filed an amended motion for summary judgment where he cited strong cases by this Court and presented a preponderance of evidence in support of all 17 claims in the four consolidated cases. [Doc.#278-285].

To prove the claims in his suit against Respondents, petitioner adduced over 1,000 pages of documentary evidence with his amended motion for summary judgment which included sworn testimony from 14 depositions, several affidavits/declarations, numerous admissions & interrogatories, specific comparison matrices, and evidence supporting Petitioner's claims of pretext, intent, and illicit motivation ascribed to the Respondents. See Petitioner's motions for summary judgment and evidence supporting them entitled "Plaintiff's Submission of Evidence Of Pretext" and "More Evidence Of Pretext And Malice". [Doc.#169, 176-185, 191, 192, 198-204, 278-286].

The material evidence supported Petitioner's claims that Respondent Local 318 breached its duty of fair representation when it misrepresented him and his grievances, and that it colluded with Respondent Postmaster General and engaged in deception & fraud to destroy Petitioner's union grievances in retaliation for his reporting its misrepresentation to the parent union, expressing his intent to expose it, and for threatening to file NLRA charges against it. Same evidence supported Petitioner's claims that USPS breached many provisions of the CBA including firing Petitioner without cause, and that Respondents and

their attorneys engaged in fraud and misconduct during the proceedings including deliberately making false, evasive, and misleading statements on admissions and interrogatories, providing false testimony during deposition hearings, influencing witnesses' testimony, and filing fraudulent affidavits in support of their motions for summary judgment.

On October 4, 1999, Petitioner filed a response to Respondent Postmaster General's amended motion for summary judgment (Doc.#286). Both Respondents failed to file any response to Petitioner's September 30, 1999 amended motion for summary judgment. On January 28, 2000, former Magistrate Judge John E. Steele, issued an order which Petitioner contends violates 28 U.S.C. 636 and Fed.R.C.P. 72(b) because all parties did not consent to his exercise of jurisdiction over this case. The order included a list of the parties' motions for summary judgment that the magistrate deemed would be accepted by the court, but omitted the listing of many important timely filed documents that were previously filed by Petitioner including his counter-motion for summary judgment and September 30, 1999 amended motion for summary judgment. [Doc.#307]. (App. at 9-12).

The order inferred that such documents were not a part of the record or would not be accepted for filing by the court and that Petitioner was prohibited from filing any evidentiary materials in response to the Respondents' motions for summary judgment. The order also misidentified Petitioner's amended motion for summary judgment as titled "Supplemental to Motion for Leave to File Suppmental Pleadings", (App. at 12) and included a summary judgment notice & admonitions which warned Petitioner that Respondents had filed

motions for summary judgment, and if the court granted any motion for summary judgment, such would be a final decision of the court in favor of the party filing the motion, and that there would be no trial or other proceeding in the case. (App. at 10-11).

Petitioner filed an Objection arguing:, inter alia, that the order excluded two of his motions for summary judment, his oppositions to Respondent's motions for summary judgment, and many other important documents, that he had already responded to Respondents' motions for summary judgment in 1998 and 1999, and that it was the Respondents who had failed to file a response to his September 30, 1999 amended motion for summary judgment. [Doc.#311]. Petitioner's Objection is reproduced in the appendix, (App. at 48-53), only because Petitioner believes it is useful to avoid confusion and essential for a better understanding of this petition. See this Court's Rule 14(1)(vi).

In its March 2, 2000 order, [Doc.#338], the district court overruled Petitioner's Objection holding that the magistrate judge's order was neither clearly erroneous or contrary to law, and stood as entered. (App. at 37].

On March 3, 2000, while inspecting the court records, Petitioner discovered that Postmaster had filed another motion for summary judgment several months past the deadline as a "response" to Petitioner's amended motion for summary judgment on the same exact date that the magistrate judge filed his order – January 28, 2000, and a copy of the motion for summary judgment was never served on Petitioner. The court never addressed these most crucial matters.

In the Pretrial Statements filed by the parties, Petition-

er presented an exhibit list of evidence which consisted of hundreds of exhibits and a witness list containing the names of 60 witnesses who would be called at trial to testify. [Doc.#290, 291, 300, 302, 305].

Despite the preponderance of material evidence Petitioner presented with his motions for summary judgment to prove his claims against Respondent Local 318, the district judge made a predetermination at a pretrial conference that he was going to grant judgment in favor of Local 318 – even though evidence revealed Petitioner had refuted the assertions in Local 318's motion for summary judgment, and that Local 318 had failed to meet its summary judgment burden by its failure to respond to Petitioner's September 30, 1999 motion for summary judgment. [Doc.#313].

On the same date, the district judge used the following analogue to describe Petitioner's Title VII discrimination claims in total disregard to the preponderance of material evidence of pretext, intent, and motive that was presented in support of Petitioner's claims against Respondent Postmaster General:

> ".....just because the toilet paper was rough in the bathroom doesn't mean they put it there because it violated Title VII somehow. That's just an odd way of saying everything in the world that happens to somebody may not be motivated by what Title VII precludes people from utilizing as a basis for discrimination." [Doc.#313]

Although evidence in front of the court revealed: that the MSPB found that Petitioner was fired without cause, that Petitioner had proved his claims against

both Respondents, that Local 318 had engaged in fraud relevant to Petitioner's union grievances, and evidence demonstrating that petitioner had exhausted administrative remedies with the EEOC, the district judge made the following statements, and predetermined that Postmaster General would win this case if Petitioner continued seeking damages from same:

> "In order to prove the requisite animus, Moore must show more than 'mere errors of judgment' or that the charge against him were false and that he was fired without cause. He has not done this." (App. at 31)
>
> "At most he has shown that he made complaints and, thereafter, the Union possibly committed errors or could have taken his grievances farther. Bad faith requires a showing of fraud or deceitful actions" (App. at 32)
>
> "Plaintiff has not completed his administrative claims before the Equal Employment Opportunity commission and is not entitled to the benefits of estoppel. In sum, though Plaintiff seeks additional compensation from the remaining Defendant, he may well lose what he has heretofore gained." (App. at 34)

The district court delayed ruling on approximately 25 motions and objections filed by Petitioner for up to two years as noted in its orders dated February 1, 2000, February 4, 2000, and March 2, 2000. (App. at 9-38); several papers filed by Petitioner that were delayed dated back as far as March and May, 1998. See order dated February 1, 2000. (App. at 14).

In its February 4, 2000 order and March 2, 2000 & March 3, 2000 judgments, the district court rendered a final judgment in favor of Respondent Local 318 in conformity to Fed.R.Civ.P. 58 and 79, denied all of Petitioner's motions for summary judgment, ordered Petitioner, sua sponte, to amend three of his suits in to one single complaint because of Petitioner's alleged "incomprehensible" "convoluted method of pleading", and allowed Respondent Postmaster General to file yet another motion for summary judgment or motion to dismiss against Petitioner. [Doc.#341] (App. at 34-36). These erroneous determinations permitted an undeserved judgment for Local 318, wrongfully exonerated Postmaster General's repeated failure to respond to Petitioner's previous motions for summary judgment, infringed Petitioner's right to a trial by jury to decide and resolve the disputed issues of intent & motive ascribed to the Respondents and his right to test his BOC/DFR claims against both Respondents at trial.

On March 9, 2000, Petitioner filed a motion to vacate the district court's February 1, 2000, February 4, 2000, March 2, 2000, and March 3, 2000 orders and judgments. [Doc.#345]. Petitioner argued that he was deprived of Due Process Rights and that the orders and judgments were based upon a fraud on the court pursuant to Fed.R.Civ.P. 60(b) which was permitted to flourish by the court during the proceedings which rendered them void. The district court invariably denied Petitioner's motion to vacate. (Doc.#395].

On March 15, 2000 and March 27, 2000, respectively, Petitioner timely filed a notice and amended notice of appeal to the Eleventh Circuit – appealing the district court's February 1, 2000, February 4, 2000, March 2 and March 3, 2000 orders and judgments.

On March 15, 2000, the district court directed the attorney for Local 318 to file a Bill For Costs and attorney fees for Petitioner to pay. [Doc.#346]. Petitioner filed an opposition to paying the bills and attorney fees for Local 318' s attorney. [Doc.#349].

On October 6, 2000, the district court removed this case from the trial calendar, altogether, leaving Petitioner without any remedy. The court refused to issue a new trial date, upon Petitioner's request. [Doc.#411].

DECISIONS of the COURT of APPEALS

On June 9, 2000, Petitioner filed his principle brief in the court of appeals. The court of appeals had jurisdiction under 28 U.S.C. 1291, 1651, and 2106. Petitioner argued that his Civil Rights were prejudiced, that the district court deprived him of Due Process Rights during the pendency of this case, that its actions orders were inconsistent with the court record, that it took no corrective action with evidence of fraud in front of the court, and that it committed harmful prejudicial errors when it: granted Respondent Local 318's motion for summary judgment; utilized the wrong standard of review for granting an award for summary judgment relevant to Petitioner's BOC/DFR claims; wrongfully applied the rule of law pursuant to 28 U.S.C. 636; denied Petitioner's motions for disqualification; ordered Petitioner to amend three of his suits into one new complaint which did not conform to the evidence; imposed a heightened pleading standard; and when it refused to impose mandatory Fed.R.Civ.P. 26(g) sanctions against Respondents for their refusal to cooperate in discovery. Petitioner further argued that the district court abused its discretion when it denied all three of Petitioner's motions for summary

judgment. Respondents argued in their briefs that the court of appeals should dismiss the appeal because it did not have jurisdiction to review the appeal since the district court didn't certify its orders under Fed.R. Civ.P. 54(b). In his reply brief, Petitioner refuted the assertions in Respondents' briefs and pointed out that with the exception of Respondents' erroneous assertion that the court of appeals lacked jurisdiction, the assertions in his principle brief were undisputed and that Local 318 effectively acknowledged that the district court's March 2, 2000 and March 3, 2000 judgments in its favor constituted final judgments.

On or about August 9, 2000, Petitioner filed a motion for temporary injunctive relief in the court of appeals pursuant to the harassment and intimidation inflicted upon him by the USPS and others which included the tampering of his pay check and other acts of harassment & intimidation that persisted after the MSPS ordered USPS to restore him to his employment, and the harassment increased in intensity & frequency since he filed an appeal of the district court orders.

On the same date, August 9, 2000, Petitioner filed a motion in the court of appeals asking it, to the extent that it was necessary, to compel the district to certify its four orders as appealable under 28 U.S.C. 1292(b) for immediate appeal. By order filed August 28, 2000, the court of appeals denied Petitioner's motion to compel, his motion for injunctive relief, and other motions. (App. at 7-8). The ongoing harassment and against Petitioner culminated in a physical assault on Petitioner by a postal employee who complained about Petitioner suing the USPS as he assaulted him and repeatedly displayed threatening conduct toward him. The incident prompted Petitioner to file a separate

lawsuit against Respondent Postmaster General and others for, inter alia, retaliation & intimidation against a witness and obstruction of justice during court proceedings under RICO Act (Racketeering Influenced and Corrupt Organization Act) statutes, 18 U.S.C. 1503, 1512, 1513, and other causes of action.

On October 16, 2000, without rendering any opinion on Petitioner's appeal, the court of appeals stayed the appeal, directed the clerk to return the record to the district court, and ordered Petitioner to file monthly status reports giving the status of trial and post-trial proceedings. (App. at 5-6). Petitioner filed monthly status reports as ordered, but it was impossible for him to give the status of any trial because the district court had removed the case from the trial calendar and refused to reschedule a new trial date upon Petitioner's request. In his first status report, Petitioner advised the court of appeals that the district court had removed the case from the trial calendar, however, it never addressed this significant issue and it took no appropriate measures.

Fourteen months later on December 13, 2001, the court of appeals dismissed Petitioner's appeal holding that the district court orders and judgment were not final and appealable, and that it (court of appeals) did not have jurisdiction to review the orders. (App. at 2). On January 22, 2002, petitioner filed a timely petition for rehearing en banc which was denied by the court of appeals by order filed on March 13, 2002. (App. at 3-4). On June 5, 2002, Petitioner filed a Petition For Writ Of Certiorari in this Court which was returned to allow Petitioner 60 days from June 11, 2002 to file a corrected petition that conforms to this Court's Rules. Petitioner now timely files this corrected petition.

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS SQUARELY WITH THE DECISIONS OF THE 2ND, 3RD, 4TH, 5TH, 6TH, & 7TH CIRCUITS

A. THE THIRD CIRCUIT

The decision of the court of appeals conflicts squarely with the authoritative decision of the Third Circuit, *North River Ins. Co. v. Cigna Reinsurance Co.*, 52 F.3d 1194, (3d Cir.1995), which held that when two parties move for summary judgment, and the district court grants one motion and denies the other, the result is a final judgment appealable under 28 U.S.C. 1291. Thus, the court of appeals erred when it ruled that the district court's February 4, 2000, March 2, and March 3, 2000 orders and judgments were not final, and that it lacked jurisdiction to review them.

B. THE FOURTH CIRCUIT

The decision of the court of appeals conflicts squarely with the decision of the Fourth Circuit, *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir.1994), which held that when two parties move for summary judgment, and the district court grants one motion for summary judgment and denies the other motion, the party that did not prevail may appeal both decisions – on the summary judgment granted against it **and** on the motion for summary judgment the court denied. Therefore, Petitioner's timely appeal of the district court orders was proper and not premature., and the

court of appeals erred when it ruled that they were not immediately appealable.

C. THE SIXTH AND SEVENTH CIRCUITS

In *Garner v. Memphis Police Dept.*, 8 F.3d (6th Cir.1993) and *Swaback v. American Information Technologies Corp.*, 103 F.3d 535 (7th Cir.1996), the Sixth and Seventh Circuits ruled that where appeal from denial of summary judgment is presented in tandem with appeal from grant of summary judgment, courts of appeals have jurisdiction to review propriety of district court's denial of summary judgment. The court of appeals' holding that it lacks jurisdiction conflicts with *Garner* and *Swaback*. Moreover, by its orders and judgment filed February 1, 2000, February 4, 2000, and March 2, 2000, respectively, the district court dismissed Petitioner's BOC/DFR claims which were brought against both Respondents in this action. Insofar as such claims along with Petitioner's Title VII claims were included in his motions for summary judgment that were denied, all four of the orders and judgments are appealable according to the above identified decisions of the Fifth and Sixth Circuits.

D. THE FIFTH CIRCUIT

The decisions of the court of appeals conflicts squarely with the decision of the Fifth Circuit, *U.S. v. O'Neal*, 709 F.2d 361 (5th Cir.1983), which held that any claim against a party that's severed pursuant to Fed.R.Civ.P. 21 is proceeded with separately and ceases to be part of the same suit. See *Rice v. Sunrise Express, Inc.*, 209 F.3d 108 (7th Cir.2000) which held the same. Petitioner contends the court of appeals erred by holding that it lacked jurisdiction over the

district court order filed February 4, 2000, and its judgments filed March 2, 2000 and March 3, 2000 where the district court created finality and appealability of same order and judgments when it severed Petitioner's BOC/DFR claims and entered a Rule 58 judgment in favor of Local 318 which disposed of the entire interest of Respondent Local 318 in the action.

E. THE SECOND CIRCUIT

The decision of the court of appeals holding that it lacks jurisdiction to review the district court orders conflicts with the decision of the Second Circuit, *In re IBM Corp.*, 45 F.3d 641 (2d Cir.1995), where the court invoked its power under 28 U.S.C. 2106 to reassign case after district court judge denied a motion to recuse and underlying litigation was deferred pending motion for writ of mandamus. In the instant case, per its orders dated February 1, 2000 and March 2, 2000, the district court denied Petitioner's motions for disqualification of the district judge and magistrate judges that were filed pursuant to 28 U.S.C. 455(a)(b).

Petitioner filed a motion in the court of appeals to stay the district court proceedings pending its opinion regarding the district court orders including orders denying Petitioner's motion for disqualification. The court of appeals denied Petitioner's motion to stay per its order filed August 28, 2000. (App. at 7-8). Based on the Second Circuit's decision, *IBM Corp.*, and in light of the fact that the district court issued a decision entering judgment in favor of Local 318 while denying Petitioner's motions for summary judgment against both respondents, the court of appeals erred by holding that it lacked jurisdiction to review those orders which denied Petitioner's motions for disqualification.

II.

THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS SQUARELY WITH ITS OWN PRIOR DECISIONS

The court of appeals held in the following previous decisions that disposition of a case on summary judgment grounds constitutes final adjudication: *National Fire Ins. Co. v. Bartolazo,* 27 F.3d 518 (11th Cir.1994); *Griffith v. Wainwright,* 772 F.2d 822 (11th Cir.1985); *Milburn v. United States,* 734 F.2d 762 (11th Cir.1984). As previously demonstrated, the district court disposed of Petitioner's entire case against Local 318 when it entered judgment in favor of same, and dismissed it as a party defendant. Therefore, its holding that the district court orders are not final conflicts squarely with its own previous decisions.

In *Fabric v. Provident Life & Accident Ins. Co.,* 115 F.3d 908 (11th Cir.1997), the court of appeals ruled that it has the power to order summary judgment to expedite litigation pursuant to its jurisdiction under 28 U.S.C. 2106 to which it stated "has become an accepted method for an appellate court to expedite litigation". In addition, it cited cases where many of its sister circuits invoked jurisdiction under 2106 to order summary judgment for a party to expedite the case in the interest of justice. Hence, its decision to dismiss Petitioner's appeal on grounds that it lacks jurisdiction to review the district court orders clearly & squarely conflicts with its own decision, *Fabric.*

When several parties move for summary judgment, each party must carry its own burden as the movant

for its motion **and as the non-movant** in response to the other party's motion. The motions are determined independently of each other. *Monumental Paving & Excavating v. Pennsylvania Mfrs' Ass'n Ins. Co.*, 176 F.3d 794 (4th Cir.1999); *Blackie v. Maine*, 75 F.3d 716 (1st Cir.1996). When the non-movant fails to file a response to a motion for summary judgment, all material facts asserted by the movant in the motions are considered to be admitted by the non-movant and the court can grant summary judgment for the movant if it satisfied its summary judgment burden. Fed.R.Civ.P. 56(e); *Champion v. Artus*, 76 F.3d 483 (2d Cir.1996). See (App. at 45).

Petitioner submits that the court of appeals erred when they disregarded the preponderance of evidence adduced by Petitioner in support of his claims and motions for summary judgment for which Petitioner believes is more than sufficient for an award of summary judgment. In *Reeves v. Sanderson Plumbing Products, Inc.*, S.Ct. No. 99-536, (decided June 12, 2000), this Court ruled that a plaintiff's prima facie case of discrimination combined with sufficient evidence for a reasonable fact finder to reject the employer's nondiscriminatory explanation for its decision, may be adequate to sustain a finding of liability for intentional discrimination ascribed to the employer.

This Court has the authority to order summary judgment for a party to expedite litigation, and if it reviews the record of this case, Petitioner is confident that it will find that not only did he establish a prima facie case in all claims and satisfy his summary judgment burden, but that the preponderance of evidence he presented to support his claims is so one-sided against Respondents that it's almost a certainty

that a jury would grant a verdict in his favor. Hence, it's the Petitioner's fervent hope that this Court would order summary judgment in his favor, accordingly, or at least vacate the lower courts' decisions and afford him the opportunity to go to trial before a jury to test his claims against both Respondents.

In its previous decision, *U.S. v. Cerceda*, 172 F.3d 806 (11th Cir.1999), the court of appeals incorporated and cited this Court's decision, *Liljberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), which not only held that appellate courts have supervisory authority over district courts under 28 U.S.C. 2106 to reassign cases where the facts "might cause an objective observer to question" a judge's impartiality, but requires the courts to consider crucial factors regarding violations of 28 U.S.C. 455 and whether such should be remedied by vacature pursuant to 60(b). The court of appeals decision to dismiss Petitioner's appeal without even considering such factors and its decision to reject Petitioner's request to reassign this case, conflicts with its own previous decision, *U.S. v. Cerceda*, as well as this Court's decision, *Liljberg*.

The decision of the court of appeals holding that the district court orders are not final conflicts with its previous decisions, *Kent v. Baker*, 815 F.2d 1395 (11th Cir.1987) and *Jones v. Gann*, 703 F.2d 513 (11th Cir.1982) which both held that a judgment is final and appealable once it is properly entered in conformity with Fed.R.Civ.P. 58 and 79(a) at which point the time begins to run for taking of an appeal. (App. at 46). In the instant case, the district court directed the Clerk to enter a separate judgment for Local 318, (App. at 33, 39-40), which complied with Rules 58 and 79(a) thereby making it final and immediately appealable.

III.

THE WRIT SHOULD BE GRANTED BECAUSE THE COURTS BELOW FAILED TO FOLLOW THE DECISIONS OF THIS COURT AND THEIR DECISIONS CONFLICT SQUARELY WITH THIS COURT'S DECISIONS

The district court orders conflicts squarely with this court's decision, *U.S. v. Diebold,* 369 U.S. 654 (1962), which held that when considering a motion for summary judgment, the court is required to view inferences in the light most favorable to the party opposing the motion. The district court failed to view inferences in the light most favorable to Petitioner when it denied his motions for summary judgment. Instead, it viewed inferences in a light most favorable to both Respondents who failed to answer Petitioner's September 30, 1999 amended motion for summary judgment and they did not meet their required burden pursuant to Fed.R.Civ.P. 56(e) to show that there was no genuine issue as to any material fact and that they were entitled to a judgment as a matter of law.

The district court orders also conflict with this court's decisions, *Eastman Kodak Co. v. Image Technical Services, Inc., et al.,* 504 U.S. 451 (1992), *Celotex Corp. v. Catrett,* 477 U.S. 317 91986), and *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986), which held that summary judgment must not be granted when the opposing party has presented sufficient evidence to raise a genuine issue in the case.

Forty-five years ago, this Court confirmed in *Labuy v. Howes Leather Co.,* 352 U.S. 249 (1957), that not only does appellate courts have supervisory power over

district courts, but that it is necessary to proper judicial administration in the federal system. This Court affirmed the Seventh Circuit's decision to issue writs of mandamus under the All Wtits Act, 28 U.S.C. 1651 requiring petitioner Labuy, a district judge, to vacate his orders in the district court. By its failure to vacate the district court orders, the court of appeals have failed to follow this court's decision, *Labuy,* and its decision to dismiss Petitioner's appeal for lack of jurisdiction conflicts squarely with *Labuy* being that it, like other courts of appeals, has supervisory authority over the district court to issue writs of mandamus pursuant to the exceptional circumstances in this case which is necessary to proper judicial administration.

The court of appeals decision conflicts with this Court's well-established decision, *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949) as well as *Lauro Lines S.R.L. v. Chaser,* 490 U.S. 495 (1989) and *Behrens v. Pelletier,* 516 U.S. 299 (1996) which all held that collateral orders are final and immediately appealable even if they do not end the litigation or terminate the action, and even in the absence of Fed.R.Civ.P. 54(b) certification.

In *Lauro Lines,* this Court reiterated the general rule that an order is collateral and appealable if it conclu-sively determines a disputed question, resolves an important issue separable from and collateral to the merits, and is effectively unreviewable on appeal from a final judgment. The district court orders & judgments include all 3 components since they disposed of the entire interest of Respondent Local 318 in the action and disposed of Petitioner's BOC/DFR claims that are intertwined with his Title VII claims brought against Respondent Postmaster General. Such impor-

tant issues are effectively unreviewable on appeal from a final judgment ending the litigation.

Notwithstanding, the court of appeals even incorporated this Court's decision, *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) and *Cohens* in its decision, *Atlantic Federal Savings & Loan Assoc. of Ft. Lauderdale*, where it reiterated that collateral orders are final and appealable. Here again, its decision conflicts with this Court's decision as well as its own.

In *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978), this Court held that a dismissal of an appeal under such circumstances as exist in this case, (where a final separate judgment was recorded in the clerk's docket), would only cause delay - which in this case, it has.

In September, 2001, the Judicial Conference approved the recommendations of the Advisory Committee on Rules of Practice and Procedure for proposed amendments to Fed.R.Civ.P. 54, 58, and other Federal Rules of Civil Procedure. The proposed amendments address the problem that arises when, because a court has failed to honor the requirement that a judgment be entered on a separate document, appeal time never begins to run under the appellate rules.

In conjunction with proposed changes to FRAP 4(a)(7), the amendment rules cure this problem by providing that when a separate document is required, judgment is entered when the first of 2 events occurs: (1) the judgment is entered on the civil docket and set forth on a separate document; or (2) when 150 days have run from entry of judgment on the civil docket.

In the instant case, inasmuch as over 800 days

have run from entry of the district court's judgments and verdict, and its denial of Petitioner's motion for summary judgment, the proposed amendments to Rules 54 and 58 are hereby incorporated by reference and made applicable in support of this Petition for a Writ of Certiorari to the extent that this Court has transmitted the proposed amendments to Congress.

IV.

THE WRIT SHOULD BE GRANTED BECAUSE THE SEVENTH AMENDMENT AND DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT ENTITLES PETITIONER TO A TRIAL BY JURY AND DISINTERESTED TRIBUNAL IN ALL CASES AND THE COURTS BELOW DEPRIVED PETITIONER OF SUCH RIGHTS

The Seventh Amendment to the Constitution of the United States provides that, "in suits at common law", the right of trial by jury is preserved. *City of Monterey v. Del Monte, Ltd, 526 U.S. 687* (1999). (App. at). Moreover, Petitioner lawsuits which consist of legal claims and "Title VII Civil Rights Act of 1991" claims also entitles Petitioner to a jury trial. In addition, Fed.R.Civ.P. 38(a)(b) provides that the right of trial by jury as provided by the Seventh Amendment or a federal statute shall be preserved for the parties, that any party may demand trial by jury of any issue so triable, and that such demand may be indorsed upon a pleading of the party . (App. at 44). Fed.R.Civ.P. 39(a) provides that when trial by jury has been demanded as provided by Rule 38, the trial by all issues so demanded shall be by jury. (App. at 44).

By unlawfully trying the case and entering judgment in favor of Local 318, the district court infringed

Petitioner's rights guaranteed under the Seventh Amendment and under the Fifth Amendment's guarantee that "no person shall be denied life, liberty, or property without due process". Such decisions by the district court conflicts squarely with this Court's decisions, *Chauffers, Teamsters, & Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990) and *Tull v. U.S.*, 481 U.S. 412 (1987) which clarified and reiterated those rights under the Seventh Amendment.

The district court orders and judgments also conflict with this Court's decisions, *White Motor Co. v. United States*, 372 U.S. 253 (1963) and *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962) as well as the Eleventh Circuit's decision, *Pearson v. Macon-Bibb County Hosp. Authority*, 952 F.2d 1274 (1992) which all held, respectively, that summary judgment is improper and inappropriate where motive and intent play leading roles in a case, and that disputed issues of intent and motive are within the province of the jury, not the district court. See also *U.S. v. Cell-Foil Products, Inc.*, Electronic Citation: 1996 FED App.0368P, Nos. 94-1419/1568 (6th Cir.1996).

Petitioner contends that the orders & judgments are void because: (1) the district court decided disputed issues of intent and motive that are preserved for the jury to decide; (2) the judgment (App. at 40) states that this case came to trial before the court which is unfounded on fact and unsupported by evidence in the record: Petitioner timely filed a demand for jury trial in each of his lawsuits. Once a jury trial has been timely demanded, a court cannot sua sponte convert those claims to a bench trial as the district court has effectively done in this case. *Fuller v. City of Oakland*, 47 F.3d 1522 (1995). (3) the judgments are void

because they violate the Seventh Amendment and Due Process clause of the Fifth Amendment by depriving Petitioner of the right to a jury trial he is entitled to.

In *Briley v. Hildago*, 981 F.2d 246 (5th Cir.1993) and *Orner v. Shalala*, 30 F.3d 1307 (10th Cir.1994), The Fifth and Tenth Circuits ruled that a judgment is void if it violates Due Process and that relief is mandatory being that discretion plays no role with respect to void orders which must be striken as a matter of law. See Fed.R.Civ.P. 60(b); (App. at 47). In *Valley v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920), this Court ruled that:

> "Courts are constituted by authority and they cannot beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, **but simply void.**" [Emphasis Supplied].

See also *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* 322 U.S. 238 (1944). Here, the district judge usurped the power of the jury, defied the decisions of this Court, and tried & decided the case himself, thereby foreclosing Petitioner's right to a trial by jury preserved by the Seventh Amendment. This reveals clear evidence of usurpation of judicial power which invoked the mandamus jurisdiction of the court of appeals under 28 U.S.C. 1651 to vacate such void judgments, hence, the court of appeals erred by dismissing Petitioner's appeal, effectively holding that it lacked jurisdiction to vacate the orders & judgments.

The Courts below failed to follow this Court's decision, *Liteky v. U.S.*, 510 U.S. 540 (1994). Upon applying the

Liteky standard, if events display an inability or unwillingness of the judge to render fair judgment, (an exception to the "extrajudicial factor") or if there is an intent that one side or the other shall prevail, there is little doubt that he or she must recuse. *Liteky* at 1159. The court of appeals and district court have deprived Petitioner of Due Process Rights contrary to this Court's decision, *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) and the Seventh Circuit's decision, *United States v. Sciuto*, 521 F.2d 842 (7th Cir.1996) which respectively declared that the Due process clause of the U.S. Constitution entitles a person to an impartial and disinterested tribunal in all cases, and that the right to a tribunal free from bias or prejudice is based, not on 28 U.S.C. 144, but on the Due Process clause.

V.

THE WRIT SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS OR HAS EFFECTIVELY SANCTIONED SUCH DEPARTURE BY THE DISTRICT COURT

It is an accepted and usual course of judicial proceedings for district courts to give fair and meaningful consideration to the claims of pro se liti-gants. In the instant case, the district court failed to give such consideration to Petitioner's claims. Almost 20 years ago, the Seventh Circuit respectively stated in its decisions, *Caruth v. Pinkney*, 683 F.2d 1044 (7th Cir.1982) and Traguth v. Zuck, 710 F.2d 90 (7th Cir.1983), that:

"It is clear that a trial court has special obliga-

> tions with respect to a pro se litigant. This heightened judicial solicitude is justified in light of the difficulties of the pro se litigant in mastering the procedural and substantive requirements of the legal structure. .....the role of the district court should be to insure that the claims of a pro se litigant are given fair and meaningful consideration."
>
> "Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants."

The distict court disregarded Petitioner's claims as well as the preponderance of evidence he adduced in support of them, and as previously noted, it delayed his motions and refused to rule on them for virtually up to two years. Moreover, the district court denied Petitioner access to the court regarding matters relevant to the jury selection process, the voire dire examination and pre-emptive challenge process:

On February 24, 2000, Petitioner filed a "Motion For Cause and Clarification Regarding Court's Duties Toward Non-Represented Litigants", noting, inter alia, that trial was scheduled to commence within 10 days on March 6, 2000 and the court had not provided any notice or information regarding prospective jurors, voire dire examination, or pre-emptive challenge. [Doc. #332]. Petitioner's motion was simply denied without any explanation. (March 2, 2000 order). (App. at 37).

The court of appeals departed from the accepted and usual course of judicial proceedings when it stayed Petitioner's appeal and ordered him to file monthly status reports of a trial that it knew never

existed, (App. at 6), then further delayed this case by waiting fourteen months before dismissing the appeal on grounds that it lacked jurisdiction. (App. at 2). Such departure by the court of appeals stalemated Petitioner's claims – placing them in an indefinite state of abeyance for over a year.

VI. CONCLUSION

In sum, the Petitioner believes he has a right to a prompt & orderly disposition of his claims and the opportunity to test his claims at trial before a jury. The court of appeal's decision to dismiss Petitioner's appeal holding that it lacks jurisdiction to review this case has further delayed Petitioner's claims, caused them to remain in an indefinite state of abeyance, and effectively infringed Petitioner's inviolable right to a trial by jury. Allowing the lower courts' decisions to stand will effectuate them to become the "Law of the Land" which would disenfranchise not only Petitioner's legal, Civil & Constitutional Rights, but those of each and every American citizen in this great nation seeking justice and fairness in our courts who are entitled to those same Rights under the Constitution of the United States. This Honorable Court is Petitioner's last and only hope for justice and a chance to finally have his day in court, hence, he therefore respectfully request that the Court grant him a Writ of Certiorari.

Respectfully Submitted,

s/Andrew P. Moore, II
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ANDREW P. MOORE, II, Plaintiff-Appellant, v. WILLIAM J. HENDERSON, POSTMASTER GENERAL and SUCCESSORS in his official capacity, U.S. POSTAL SERVICE; LOCAL 318, NATIONAL POSTAL MAILHANDLERS UNION, Defendants-Appellees.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-11449-HH

FILED DEC. 13, 2001, U.S. COURT OF APPEALS ELEVENTH CIRCUIT, THOMAS K. KAHN, CLERK

PRIOR HISTORY: On appeal from the United States District Court for the Middle District of Florida, Jacksonville Division. (Consolidated D.C. Nos. 3:97-cv-531-J-20C, 3:97-cv-613-J-20C, 3:98-cv-120-J-20C, 3:98-cv-393-J-20A)

DISPOSITION: DISMISSED.

COUNSEL: Andrew P. Moore, II, Pro Se, proceeded by and on behalf of himself as Plaintiff-Appellant.

Charles L. Truncale, Asst. U.S. Attorney, Tamra Phipps, Asst. U.S. Attorney, Chief, Appellate Division, Donna A. Bucella, U.S. Attorney, Attorneys for Defendant-Appellee Postmaster General.

Tobe Lev, Lindsay N. Oyewale, Egan, Lev & Siwica, Attorneys for Defendant-Appellee Local 318.

JUDGES: BEFORE: EDMONDSON, BIRCH, and BARKETT, Circuit Judges.

DECISION: DECISION BY THE COURT

This appeal is DISMISSED for lack of jurisdiction. The district court's February 1, 2000, February 4, 2000, and March 2, 2000, orders, and March 3, 2000, judgment, are not final or immediately appealable. 28 U.S.C. 1291; *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949); *Bank South Leasing, Inc. v. Williams*, 769 F.2d 1497, 1500 n. 1 (11th Cir.), *vacated on other grounds*, 778 F.2d 704 (11th Cir.1985); *Williams v. Bishop*, 732 F.2d 885, 885-86 (11th Cir.1984); *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1368 (11th Cir.), *cert. denied*, 464 U.S. 893 (1983); *Rouse Constr. Int'l. Inc. v. Rouse Constr. Corp.*, 680 F.2d 743, 745 (11th Cir.1982; *In re Corrugated Container Antitrust Litig.*, 614 f.2d 958, 960-61 (5th Cir.) *cert. denied*, 449 U.S. 888 (1980); *Wells v. South Main Bank*, 532 F.2d 1005, 1006 (5th Cir.1976).

ANDREW P. MOORE, II, Plaintiff-Appellant, v. WILLIAM J. HENDERSON, POSTMASTER GENERAL and SUCCESSORS in his official capacity, U.S. POSTAL SERVICE; LOCAL 318, NATIONAL POSTAL MAILHANDLERS UNION, Defendants-Appellees.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-11449-HH

FILED MAR. 13, 2002, U.S. COURT OF APPEALS ELEVENTH CIRCUIT, THOMAS K. KAHN, CLERK

PRIOR HISTORY: On appeal from the United States District Court for the Middle District of Florida, Jacksonville Division. (Consolidated D.C. Nos. 3:97-cv-531-J-20C, 3:97-cv-613-J-20C, 3:98-cv-120-J-20C, 3:98-cv-393-J-20A). Appeal dismissed in the United States Court of Appeals for the Eleventh Circuit.

DISPOSITION: APPELLANT'S PETITION FOR REHEAR -ING EN BANC (CONSTRUED AS A MOTION FOR RECONSIDERATION) DENIED.

COUNSEL: Andrew P. Moore, II, Pro Se, proceeded by and on behalf of himself as Plaintiff-Appellant.

Charles L. Truncale, Asst. U.S. Attorney, Tamra Phipps, Asst. U.S. Attorney, Chief, Appellate Division, Donna A. Bucella, U.S. Attorney, Attorneys for Defendant-Appellee Postmaster General.

Tobe Lev, Lindsay N. Oyewale, Egan, Lev & Siwica, Attorneys for Defendant-Appellee Local 318.

JUDGES: BEFORE: EDMONDSON, BIRCH and BARKETT, Circuit Judges.

DECISION: DECISION BY THE COURT

Andrew P. Moore's January 25, 2002, motion for reconsideration of the December 13, 2001 order dismissing this appeal for lack of jurisdiction, is DENIED.

ANDREW P. MOORE, II, Plaintiff-Appellant, v. WILLIAM J. HENDERSON, POSTMASTER GENERAL and SUCCESSORS in his official capacity, U.S. POSTAL SERVICE; LOCAL 318, NATIONAL POSTAL MAILHANDLERS UNION, Defendants-Appellees.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-11449-HH

FILED OCT. 16, 2000, U.S. COURT OF APPEALS ELEVENTH CIRCUIT, THOMAS K. KAHN, CLERK

PRIOR HISTORY: On appeal from the United States District Court for the Middle District of Florida, Jacksonville Division. (Consolidated D.C. Nos. 3:97-cv-531-J-20C, 3:97-cv-613-J-20C, 3:98-cv-120-J-20C, 3:98-cv-393-J-20A)

DISPOSITION: APPEAL STAYED. ALL MOTIONS FILED BY APPELLANT – DENIED.

COUNSEL: Andrew P. Moore, II, Pro Se, proceeded by and on behalf of himself as Plaintiff-Appellant.

Charles L. Truncale, Asst. U.S. Attorney (Argued), Tamra Phipps, Asst. U.S. Attorney, Chief, Appellate Division, Donna A. Bucella, U.S. Attorney, Attorneys for Defendant-Appellee Postmaster General.

Tobe Lev (Argued), Lindsay N. Oyewale, Egan, Lev & Siwica, Attorneys for Defendant-Appellee Local 318.

JUDGES: BEFORE: EDMONDSON, COX, and BIRCH,

Circuit Judges.

DECISION: BY THE COURT

Appellant's "Motion for Court to Issue Ruling...," construed as a motion for expedited consideration of this appeal or, in the alternative, to reconsider the denial of Appellant's motion to stay the district court's proceedings, is DENIED.

On its own motion, the Court STAYS this appeal pending disposition of the proceedings in district court. The Clerk is directed to return the record to district court immediately. Appellant is directed to file monthly reports with the Court, giving the status of the trial and post-trial proceedings below.

Appellant's "Motion for Findings of Fact...," construed as a motion for clarification of this Court's August 28, 2000, order, is DENIED.

ANDREW P. MOORE, II, Plaintiff-Appellant, v. WILLIAM J. HENDERSON, POSTMASTER GENERAL and SUCCESSORS in his official capacity, U.S. POSTAL SERVICE; LOCAL 318, NATIONAL POSTAL MAILHANDLERS UNION, Defendants-Appellees.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-11449-HH

FILED AUG. 28, 2000, U.S. COURT OF APPEALS ELEVENTH CIRCUIT, THOMAS K. KAHN, CLERK

PRIOR HISTORY: On appeal from the United States District Court for the Middle District of Florida, Jacksonville Division. (Consolidated D.C. Nos. 3:97-cv-531-J-20C, 3:97-cv-613-J-20C, 3:98-cv-120-J-20C, 3:98-cv-393-J-20A)

DISPOSITION: ALL MOTIONS FILED BY APPELLANT – DENIED.

COUNSEL: Andrew P. Moore, II, Pro Se, proceeded by and on behalf of himself as Plaintiff-Appellant.

Charles L. Truncale, Asst. U.S. Attorney, Tamra Phipps, Asst. U.S. Attorney, Chief, Appellate Division, Donna A. Bucella, U.S. Attorney, Attorneys for Defendant-Appellee Postmaster General.

Tobe Lev, Lindsay N. Oyewale, Egan, Lev & Siwica, Attorneys for Defendant-Appellee Local 318.

JUDGES: BEFORE: COX, BLACK, and HULL,

Circuit Judges.

DECISION: BY THE COURT

Appellant's "Motion for Injunctive Relief Pending Appeal" is DENIED.

Appellant's "Motion to Compel District Court...," construed as a motion for limited remand with instructions to certify certain interlocutory orders as immediately appealable, is DENIED.

Appellant's "Motion to Compel District Court to Correct...," construed as a motion for limited remand with instructions to the district court to modify the summaries of certain orders appearing on the docket sheets, and to supplement the record with such corrections, is DENIED.

Appellant's "Motion to Stay Districy Court Proceedings..." is DENIED.

ANDREW P. MOORE, II, Plaintiff v. WILLIAM J. HENDERSON, POSTMASTER GENERAL and SUCCESSORS in his official capacity, U.S. POSTAL SERVICE; LOCAL 318, NATIONAL POSTAL MAILHANDLERS UNION, Defendants.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Consolidated Case: Nos.
3:97-cv-531-J-20C
3:97-cv-613-J-20C
3:98-cv-120-J-20C
3:98-cv-393-J-20A

FILED JAN. 28, 2000, CLERK, U.S. DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA JACKSONVILLE, FL.

COUNSEL: Andrew P. Moore, II, Pro Se, proceeded by and on behalf of himself as Plaintiff. Maxie Broome, Jr. [term 11/06/97] and Earl M. Johnson, Jr. [term 07/17/98], former Attorneys for Plaintiff Moore.

Reginald Luster, Asst. U.S. Attorney, Lorenzo Cobb, Attorneys for Defendant Postmaster General.

Tobe M. Lev, Eagan Lev, & Siwica, Attorneys for Defendant Local 318.

JUDGE: BEFORE: U.S. DISTRICT JUDGE HARVEY E. SCHLESINGER

ORDER: BY MAGISTRATE JUDGE JOHN E. STEELE

ORDER

The following Motions for Summary Judgment are pending before the Court and filed in the lead case file, Case No. 3:97-cv-531-j-20C: Defendant Local 318's Motion for Summary Judgment (Doc. No. 135, filed on September 18, 1998); (2) Plaintiff Moore's Motion for Summary Judgment (Doc. No. 169, filed on November 13, 1998); (3) Defendant Runyon's Motion for Summary Judgment (Doc. No. 170, filed on November 13, 1998) and Defendant Henderson's Motion for Summary Judgment (Doc. No. 275, filed on September 24, 1999). The following related motions have also been filed: Defendant Henderson's Unopposed Motion to File Memorandum in Excess of Twenty Pages (Doc. No. 276, filed on September 24, 1999) and Plaintiff Moore's Motion for Leave to File Supplemental Pleadings and Evidentiary Materials in reference to Motion for Summary Judgment (Doc. No. 274, filed on September 21, 1999). The Court notes that although several Summary Judgment Notices have been filed in this case, the Clerk's Office has failed to file its standard Summary Judgment following the filing of Local 318's Motion for Summary Judgment and Defendant Henderson's Amended Motion. Because Plaintiff is proceeding *pro se* it would be inappropriate to rule on Local 318's Motion or Defendant Henderson's Amended Motion without having first given the apprpopriate warnings. The parties are **HEREBY ORDERED TO HEED THE FOLLOWING SUMMARY JUDGMENT NOTICE:**

SUMMARY JUDGMENT NOTICE

Be advised that motions for summary judgment

pursuant to Rule 56, Federal Rules of Civil Procedure, have been filed in the case. Unless the Court notifies the parties otherwise, there will not be a hearing on these motions; instead, the Court will decide the motions on the basis of the motions, responses, briefs or legal memoranda, and evidentiary materials filed by the parties. See Rule 3.01(b)(,(d), Local Rules, Middle District of Florida. The Court will consider these motions and make its decision after eleven (11) days from the date of this Notice. Consequently, **any response** to these motions, as well as all supporting evidentiary materials (counter-affidavits, depositions, exhibits, etc.) must be filed with the Clerk of this Court **before the expiration of that eleven-day period.**

The following explanatory admonitions are included here for the benefit of pro se parties (i.e., parties not represented by an attorney) who oppose the summary judgment motions. **In addition to the above paragraph,** you are also **advised** that if the Court grants these motions for summary judgment, such would be a **final decision** of the Court in favor of the party filing the motion ("movant"). As a result of such final decision, there would be no trial or other proceedings in this case, and you would likely be precluded from later litigating this matter or any related matters. Therefore, you are hereby further **advised:** (1) failing to respond to these motions will indicate that the motions are not opposed; (2) all material facts asserted by the movant in the motions will be considered to be admitted by you unless controverted by proper evidentiary materials (counter-affidavits, depositions, exhibits, etc.) filed by you; and (3) you may not rely solely on the allegations of the issue pleadings (e.g., complaint, answer, etc.) in opposing these motions. See Griffith v.

Wainwright, 772 F.2d 822, 825 (11th Cir.1985).

Finally, upon due consideration, it is hereby **ORDERED AND ADJUDGED:**

1. Defendant Henderson's Motion to file a Memorandum in excess of twenty Pages (Doc. No. 276) is **GRANTED** and the Memorandum attached thereto is **ACCEPTED FOR FILING.**

2. Plaintiff's Motion for Leave to File Supplemental Pleadings is (Doc. No. 274) is **DENIED** insofar as it seeks permission to file pleadings and **GRANTED** insofar as it seeks permission to file the following documents which the Clerk has already placed in the file: document titled "Supplement to Motion for Leave to File Supplemental Pleadings" (Doc. No. 278, filed on September 30, 1999), the Depositions of Lillian Wells, Nancy Rohr and Harriet Dillyhon (Doc. Nos. 279-281, filed on September 30, 1999); the "Supplemental 1999 Memorandum of Law (Doc. No. 283, filed on September 30, 1999); the "Declaration of Andrew P. Moore, II" (Doc. No. 284, filed on September 30, 1999). The Motion for Leave to Supplement is **MOOT** insofar as it requests leave to file any additional memoranda or evidence in response to Local 318's Motion for Summary Judgment or Defendant Henderson's Amended Motion for Summary Judgment as required by the above Summary Judgment Notice.

DONE AND ORDERED at Jacksonville, Florida, this 28th day of January, 2000.

s/ John E. Steele
United States Magistrate Judge

ANDREW P. MOORE, II, Plaintiff v. WILLIAM J. HENDERSON, POSTMASTER GENERAL and SUCCESSORS in his official capacity, U.S. POSTAL SERVICE; LOCAL 318, NATIONAL POSTAL MAILHANDLERS UNION, Defendants.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Consolidated Case: Nos.
3:97-cv-531-J-20C
3:97-cv-613-J-20C
3:98-cv-120-J-20C
3:98-cv-393-J-20A

FILED FEB. 1, 2000, CLERK, U.S. DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FL.

DISPOSITION: PLAINTIFF'S: MOTIONS TO COMPEL – DENIED; MOTIONS FOR SANCTIONS – DENIED; MOTIONS FOR CONTEMPT OF COURT – DENIED; MOTION FOR CAUSE and CLARIFICATION – DENIED; MOTIONS TO STRIKE – DENIED; MOTION IN LIMINE – DEFERRED; OBJECTIONS – OVERRULED; DEFENDANT POSTMASTER GENERAL'S MOTION TO STRIKE PLAINTIFF'S NOTICE OF PENDENCY – GRANTED AND SEALED; DEFENDANT LOCAL 318'S MOTION IN LIMINE - DEFERRED; DEFENDANT LOCAL 318'S MOTION FOR SEPARATE TRIAL – DENIED.

COUNSEL: Andrew P. Moore, II, Pro Se, proceeded by and on behalf of himself as Plaintiff.

Reginald Luster, Asst. U.S. Attorney, Lorenzo Cobb, Attorneys for Defendant Postmaster General.

Tobe M. Lev, Eagan Lev, & Siwica, Attorneys for Defendant Local 318.

JUDGE: BEFORE: U.S. DISTRICT JUDGE HARVEY E. SCHLESINGER, presiding District Judge.

ORDER: BY U.S. DISTRICT JUDGE HARVEY E. SCHLESINGER, presiding District Judge.

ORDER

Part A:

OBJECTIONS TO MAGISTRATE JUDGE'S ORDERS AND MOTIONS TO WITHDRAW REFERENCE TO, OR OTHERWISE DISQUALIFY, MAGISTRATE JUDGE

Plaintiff has filed the following Objections to Orders entered by U.S. Magistrate Judge J. Corrigan pursuant to 28 U.S.C. 636(b)(1)(A) and filed in the lead case file, no. 3:97-cv-531-J-20C: (1) "Plaintiff's Objections to U.S. Magistrate Judge's Order" (Doc. No. 83, filed on March 25, 1998) addressing the Order filed on May 23, 1998 (Doc. No. 81):(2) "Plaintiff's Objection and Motion for Reconsideration of Court Order Dated October 19, 1998" (Doc. No. 165, filed on October 26, 1998) addressing Doc. No. 164; (3) Plaintiff's Objections to Court Order Dated April 1, 1999 and Request for De Novo Review and Determination (Doc. No. 239, filed April 5, 1999) addressing Doc. No. 237; ("Plaintiff's Objections to Magistrate Judge's Order Filed May 5, 1999 and Request for De Novo Review

Determination" (Doc. No. 250, filed on May 13, 1999) addressing the Protective Order filed on May 5, 1999 (Doc. No. 247); and (5) "Plaintiff's Response and Objection to Magistrate Judge's Order Dated June 9, 1999 and Defendants' Responses" (Doc. No. 266, filed on June 21, 1999) addressing the Order filed June 10, 1999 (Doc. No. 262) and Defendant's Response (Doc. No. 265, filed June 14, 1999). Plaintiff has also filed a Declaration seeking to disqualify Magistrate Judge Corrigan on alleged grounds of prejudice, acts in excess of jurisdiction and lack of consent to proceed before a Magistrate Judge (Doc. No. 251, filed on May 13, 1999).

Upon review of the Magistrate Judge's Orders and Defendants [sic.] objections listed above, the Court finds that Defendant's [sic.] objections are without merit. The Magistrate Judge's Orders listed above were not clearly erroneous or contrary to law. Accordingly, Defendant's [sic.] Objections are **OVERRULED** and the Magistrate Judge's Orders will stand as issued. Further, the Court has carefully reviewed the record and finds no evidence that Magistrate Judge Corrigan has either exceeded his authority or has demonstrated prejudice of any sort towards Plaintiff and no grounds to suspect abuse of authority or prejudice. Accordingly, the Plaintiff's Declaration (Doc. No. 251) which the Court construes as a Motion to Withdraw Reference or otherwise disqualify Magistrate Judge Corrigan from further proceedings in the case is **DENIED.**

Part B

OTHER PENDING MOTIONS

These cases are before the Court on the following Motions concerning discovery matters and sanctions: (1) Plaintiff's Motion for Sanctions (Doc. No. 253, part 1, filed on May 20, 1999); (2) Plaintiff's Motion to Compel Production (Doc. No. 253, part 2); (3) Plaintiff's Motion for Sanctions (Doc. No. 254, part 1, filed on May 20, 1999); (4) Plaintiff's Motion to Compel disclosures (Doc. No. 254, part 2); (5) Plaintiff's Motion for Sanctions (Doc. No. 256, filed on May 26, 1999); and (6& 7) Plaintiff's Motion for sanctions and for Contempt of Court (Doc. No. 291, parts 1 and 2). Defendant Henderson's Motion to Strike Plaintiff's Notice of Pendency [of Grievances filed against Defendant's Counsel] (Doc. No. 297, filed November 17, 1999 seeking to strike Doc. No. 296, filed December 7, 1999) is also ripe for decision.

The following motions which are relevant to the manner in which the Court will conduct any trial of the factual issues are also before the Court: (A) Defendant Local 318's Motion in Limine (Doc. No. 214, filed on January 27, 1999); (b) Defendant Local 318's Motion for Separate Trial from Case No. 3:97-cv-613-J-20C (Doc. No. 220 filed on January 27, 1999); (C) Plaintiff's Motion in Limine Regarding Expert Opinions (Doc. No. 220 filed on February 5, 1999); (D) Plaintiff's Motion for a Ruling on Defendant Local 318's Motions (Doc. No. 240, filed on April 5, 1999 seeking a ruling as to Doc. Nos. 214 & 215; (E) Plaintiff's Motion to Strike Rule 26(a)(2) Disclosures (Doc. No. 271, filed on July 22, 1999); a related motion, (F) Plaintiff's Motion For Cause and Clarification of Scheduling Order (Doc. No. 295). Plaintiff has also filed a Motion entitled "Motion for Cause" (Doc. 252, filed on May 13, 1999) which, while not related to trial, is appropriate to

address in this Order.

1. The following Motions are **DENIED:**

> (A) Plaintiff's Motion for Sanctions (Doc. No. 253, part 1); (B) Plaintiff's Motion to Compel Production (Doc. No. 253, part 2); (C) Plaintiff's Motion for Sanctions (Doc. No. 254, part 1); (D) Plaintiff's Motion for Sanctions (Doc. No. 256); (E) Plaintiff's Motion for Sanctions (Doc. No. 291, Part 1); and (F) Plaintiff's Motion for Contempt (Doc. No. 291, part 2).

2. Plaintiff'f Motion to Compel (Doc. No. 254, part 2) is **GRANTED IN PART** insofar as defendant Henderson **MUST INFORM DEFENDANT [sic] OF THE TOTAL NUMBER OF HOURS EXPENDED BY DR. PHILLIPS AND THE TOTAL ENTITLEMENT TO COMPENSATION FOR SERVICES RENDERED THAT HE HAS ACCRUED TO DATE** within **ELEVEN DAYS** of the date of this order. In all other respects, the Motion is **DENIED.**

3. Defendant Henderson's Motion (Doc. No. 297) to strike Plaintiff's Notice of Pendency (Doc. No. 296) is **GRANTED.** The Clerk shall seal said notice and place it on the left hand side of the file.

4. It is this Court's long standing practice to rule on Motions in Limine at trial. Accordingly, the pending Motions in Limine (Doc. Nos. 214, 220 & 287) are **DEFERRED AND CARRIED WITH THE CASE.**

5. Defendant Local 318's Motion for Separate Trial

raises concerns which are easily addressed by Rule 50 motions, jury instructions and verdict forms. Accordingly, the Motion (Doc. No. 215) is **DENIED.**

6. The Court having ruled as to Doc. Nos. 214 and 215, Plaintiff's Motion for a Ruling (Doc. No. 240) is **MOOT.**

7. Plaintiff's Motions to Strike filed on July 22, 1999 and October 4, 1999 (Doc. Nos. 271 & 287) are **DENIED.**

8. Plaintiff's Motion for cause and Clarification (Doc. No. 295) is nothing more than plaintiff's expression of suspicion that there is something untoward in the Court's issuance of orders controlling its own scheduling, *sua sponte.* The Motion is **DENIED.**

9. Plaintiff's Motion for Cause (Doc. No. 252) asks the Court to explain why it has not ruled on the Motions addressed in this Order and several Objections to Magistrate Judge's Orders. Since the Court has ruled, the Motion is **MOOT.**

DONE AND ORDERED at Jacksonville, Florida, this 1st day of February, 2000.

s/ Harvey E. Schlesinger
United States District Judge

ANDREW P. MOORE, II, Plaintiff v. WILLIAM J. HENDERSON, POSTMASTER GENERAL and SUCCESSORS in his official capacity, U.S. POSTAL SERVICE; LOCAL 318, NATIONAL POSTAL MAILHANDLERS UNION, Defendants.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Consolidated Case: Nos.
3:97-cv-531-J-20C
3:97-cv-613-J-20C
3:98-cv-120-J-20C
3:98-cv-393-J-20A

FILED FEB. 4, 2000, CLERK, U.S. DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FL.

DISPOSITION: PLAINTIFF'S: MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS POSTMASTER GENERAL and LOCAL 318 – DENIED; MOTIONS TO COMPEL – DENIED; MOTION FOR SANCTIONS – DENIED; MOTION FOR PROTECTIVE ORDER – DENIED. CASE NO. 3:98-cv-393-J-20A – DISMISSED in its entirety; BOC/DFR CLAIMS AGAINST POSTMASTER GENERAL and LOCAL 318 - DISMISSED; CLAIMS for PUNITIVE DAMAGES AGAINST POSTMASTER GENERAL and LOCAL 318 - DISMISSED; COMPLAINTS of UNFAIR LABOR PRACTICES - DISMISSED; CLAIMS for COMPENSATORY DAMAGES AGAINST LOCAL 318 - DISMISSED.

COUNSEL: Andrew P. Moore, II, Pro Se, proceeded by

and on behalf of himself as Plaintiff.

Reginald Luster, Asst. U.S. Attorney, Lorenzo Cobb, Attorneys for Defendant Postmaster General.

Tobe M. Lev, Eagan Lev, & Siwica, Attorneys for Defendant Local 318.

JUDGE: BEFORE: U.S. DISTRICT JUDGE HARVEY E. SCHLESINGER, presiding District Judge.

ORDER: BY U.S. DISTRICT JUDGE HARVEY E. SCHLESINGER, presiding District Judge.

ORDER

Part A: Dismissal of Claims Barred by Federal Law

Plaintiff's four consolidated cases include the following causes of action and claims for damages that are barred by federal law:

(1) *Claims for punitive damages against the Postal Service or the Postmaster in his official capacity*

Punitive damages claims are not available against the Postal Service in employment cases. *Baker v. Runyon*, 114 F.3d 668, 669 (7th Cir. 1987) *cert. denied*, ___U.S. ___, 119 S.Ct. 335 (1998);

(2) *Claims for punitive damages against Local 318*

To remedy a breach of the duty of fair representation, a court must issue an award "fashioned to make the injured employee whole. "but it cannot award exempla-

ry or punitive damages *Electric Workers v. Foust*, 442 U.S. 42, 49-52 (1979);

(3) *All Bivens claims including, but not limited to, the entirety of Case No. 3:98-cv-393-J-20A*

As to the individual employees and supervisors named in the *Bivens* claims, the availability of a grievance mechanism precludes a *Bivens* action against them. *McCollum v. Bolger*, 794 F.2d 602 (11th Cir.1986) *cert. denied*, 479 U.S. 1034 (1987). Further Plaintiff has failed to properly serve the named individuals and the Postmaster. The Court lacks personal jurisdiction over the named individuals as to this case because they have never been served with process. Finally, no *Bivens* action can be brought against the Postmaster in his official capacity or against the Postal Service. Section 717(c) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16 "provides the exclusive judicial remedy for claims of discrimination in federal employment" *Brown v. GSA*, 425 U.S. 820, 835 (1976); *Accord, United States v. Fausto*, 484 U.S. 439, 453 (1988); *Bush v. Lucas*, 462 U.S. 367 (1983)(there is no common law right to recover damages in a civil action taken for unconstitutional actions in federal employment.) Nor may suit be brought under the Tucker Act, 28 U.S.C. 1346(a), *United States v. Fausto*, 484 U.S. at 453, or the Federal Tort Claims Act, Act, 28 U.S.C. 1346(b), Young v. United States, 498 F.2d 1211, 1214-19 (5th Cir.1974)(binding in the Eleventh Circuit under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981)(en banc).) Finally, an employee may not circumvent the detailed scheme of remedied governing federal employment relations by suing under the broader Adminstrative Procedures Act, *Broadway v.*

Block, 694 F.2d 979, 986 (5th Cir.1982);

(4) Claims for breach of contract against the Postal Service

Moore abandoned his contractual claim by proceeding to the Merit Systems Protection Board. 5 U.S.C. 7121(d), Guerra v. Cuomo, 176 F.3d 547, 548-51 (D.C. Cir.1999).

Complaints of unfair labor practices, violations of the Collective Bargaining Agreement and contractual claims based upon the Union's constitution

Complaints of unfair labor practices, as a general rule, are exclusively within the jurisdiction of the National Labor Relations Board, See, San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245, 79 S.Ct. 773, 779, 3 L.Ed.2d 777 (1959). Section 301 of the Labor Management Relations Act, 29 U.S.C. 185 (1976), however, created an exception to the general rule by grnating federal courts jurisdiction over suits for violations of labor contracts. Section 301 also has been interpreted to give federal courts jurisdiction over claims of a union's breach of its duty to fairly pursue employees contract claims. *See Amalgamated Association of Street, Electric Railway and Motor Coach Employees of American v. Lockridge, 403 U.S. 274, 301 (1971).* Violations of the union constitution and collective bargaining agreement by local 318 were not raised in the complaints or amended complaints of either suit in which it is named as a defendant. Accordingly, for breach, other than duty of fair representation, no claims for unfair labor practices may be pursued in these cases;

(6) *Tort claims against the Local 318 that require an interpretation of the Collective Bargaining Agreement*

"If the resolution of a state-law claim depends upon interpreting the terms of a collective bargaining agreement, then the state-law claim is preempted by the LMRA." *Turner v. American Federation of Teachers*, 138 F.3d 878, 884 (11th Cir.1998)

(7) *Claims for compensatory damages against local 318 which are attributable to the Postal Service and to the increase in damages caused by any breach of the duty of fair representation*

The award of any additional damages against Local 318 is barred by the Supreme Court's decision in *Bowen v. United States Postal Service*, 459 U.S. 212, 223 (1983).

For the reasons stated above, the claims and causes of action listed above are **DISMISSED.**

Part B: Pending Motions Related to Discovery

The following discovery-related motions are pending before the Court: (1) Plaintiff's Motion to Compel Defendant Henderson to Make its (sic.) Expert Witness Available for Deposition (Doc. No. 245, filed on April 30, 1999); Plaintiff's Motion for a Protective Order (Doc. No. 246, filed on April 30, 1999); Plaintiff's Motion for Sanctions (Doc. No.257, filed on May 26, 1999); Plaintiff's Motion to Compel (Doc. No. 263, filed on June 10, 1999); Plaintiff's Motion to Compel (Doc. No. 264, filed on June 10, 1999) and Plaintiff's Motion to Compel [the residential] Addresses of Witnesses (Doc. No. 306, filed on January 27, 2000, bracketed

information added). Upon due consideration:

(A) Plaintiff's Motion to Compel (Doc. No. 245) is **DENIED;** (B) Plaintiff's Motion for a Protective Order (Doc. No. 246) is **DENIED;** (C) Plaintiff's Motion for Sanctions (Doc. No. 257) is **DENIED;** (D) Plaintiff's Motion to Compel (Doc. No. 263) is **MOOT;** (E) Plaintiff's Motion to Compel (Doc. No. 264) is **DENIED;** and (F) Plaintiff's Motion to Compel Addresses of Witnesses (Doc. No. 306) is **DENIED.**

The business addresses previously provided are sufficient for the service of subpoena.

Part C: Plaintiff's Motion for Summary Judgment

Plaintiff's Motion for Summary Judgment (Doc. No. 169, filed on November 13, 1998) fails to resolve questions of material fact. Accordingly, upon due consideration, the Motion is **DENIED.**

DONE AND ORDERED at Jacksonville, Florida, this 4th day of February, 2000.

s/ Harvey E. Schlesinger
United States District Judge

ANDREW P. MOORE, II, Plaintiff v. WILLIAM J. HENDERSON, POSTMASTER GENERAL and SUCCESSORS in his official capacity, U.S. POSTAL SERVICE; LOCAL 318, NATIONAL POSTAL MAILHANDLERS UNION, Defendants.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Consolidated Case: Nos.
3:97-cv-531-J-20C
3:97-cv-613-J-20C
3:98-cv-120-J-20C
3:98-cv-393-J-20A

FILED MAR. 2, 2000, CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FL.

DISPOSITION: DEFENDANT LOCAL 318'S MOTION FOR SUMMARY JUDGMENT – GRANTED; PLAINTIFF'S: COUNTER-MOTION FOR SUMMARY JUDGMENT – DENIED; AMENDED MOTION FOR SUMMARY JUDGMENT – DENIED; MOTION TO STAY COURT ORDERS – DENIED; MOTION TO STAY TRIAL and PROCEEDING – DENIED; MOTION TO DISQUALIFY – DENIED; MOTIONS FOR FINDINGS of FACT and CONCLUSIONS OF LAW – DENIED; MOTION FOR CAUSE and CLARIFICATION – DENIED; MOTION TO STRIKE – DENIED; OBJECTIONS – OVERRULED; PLAINTIFF ORDERED TO AMEND THREE CASES INTO ONE NEW SINGLE AMENDED COMPLAINT and FILE SAME; DEFENDANT POSTMASTER GENERAL'S MOTION FOR SUMMARY JUDGMENT – MOOT.

COUNSEL: Andrew P. Moore, II, Pro Se, proceeded by and on behalf of himself as Plaintiff.

Reginald Luster, Asst. U.S. Attorney, Lorenzo Cobb, Attorneys for Defendant Postmaster General.

Tobe M. Lev, Eagan Lev, & Siwica, Attorneys for Defendant Local 318.

JUDGE: BEFORE: U.S. DISTRICT JUDGE HARVEY E. SCHLESINGER, presiding District Judge.

ORDER: BY U.S. DISTRICT JUDGE HARVEY E. SCHLESINGER, presiding District Judge.

ORDER

This case is before the Court on (1) Defendant Local 318's Motion For Summary Judgment (Doc. No. 135, filed on August 18, 1998); (2) Defendant Local 318's Motion for Attorneys Fees under Rule 11 (Doc. No. 134, filed on August 18, 1998); (3) Defendant Postmaster's Motion for Summary Judgment (Doc. No. 170 filed on November 13, 1998); (4) Plaintiff's Counter Motion for Summary Judgment (Doc. No. 198, filed on December 7, 1998) as subsequently amended and supplemented; (5) Defendant Postmaster's Amended Motion For Summary Judgment (Doc. No. 275, filed on August 24, 1999); (6) Plaintiff's Motion to Stay Court Order (Doc. No. 316, part 1, filed on February 10, 2000); (9) Plaintiff's Motion for Findings of Fact and Conclusions of Law (Doc. 317, part 2); (10) Plaintiff's for Emergency Rulings on Pending Motions (Doc. No. 324, filed on February 17, 2000); (11) Plaintiff's Motion To Stay Trial and Proceeding (Doc. No. 327, filed on

February 23, 2000); (12) Plaintiff's Motion to Disqualify Judge Schlesinger (Doc. No. 328, filed on February 23, 2000); (13) Plaintiff's Motion to Disqualify Magistrate Judge Corrigan (Doc. No. 329, filed on February 23, 2000); (14) Plaintiff's Motion to Disqualify Magistrate Judge Steele (Doc. No. 329, filed on February 23, 2000); (15) Plaintiff's Motion for Cause and Clarification (Doc. No. 332, filed on February 24, 2000); (16) Plaintiff's Motion to Strike Defendant Henderson's Notice Pendency of Other Actions (Doc. No. 333, filed on February 24, 2000).

Plaintiff has also filed Objections (Doc. Nos. 311, filed on February 3, 2000) challenging a magistrate Judge's Order (Doc. No. 307, filed on January 28, 2000) as well as Objections (Doc. No. 335, filed on February 28, 2000) challenging Defendant's Notices of Clarification (Doc. Nos. 325, filed on February 17, 2000 and 331, filed on February 24, 2000).

On February 4, 1999, [sic.] the Court ordered plaintiff to show cause why his case should not be dismissed for failure to appear at the Pretrial Conference and to also show cause why the Court should not require him to pay the Local 318's attorney's fees and travel expenses for the attendance of its attorney, Tobe Lev, Esq., at the hearing (Doc. No. 312). Plaintiff's response to that Order will be addressed in this Order.

Plaintiff's Response to Order to Show Cause

Plaintiff's response to the Court's Order to Show Cause shows adequate cause for this Court to decline to impose the extraordinary sanction of dismissal of

these cases. Plaintiff has failed to show adequate cause why he should not be required to pay the Local 318's attorney's fees and expenses for the attendance of Tobe Lev, Esq. At the Pretrial Conference. Accordingly, Mr. Lev shall, within **ELEVEN (11) DAYS of the date of this Order submit a bill for costs and attorney fees. Plaintiff shall have ELEVEN (11) DAYS** thereafter to file an response or objections.

Motion for Emergency Rulings

Plaintiff's Motion for Emergency Rulings (Doc. No. 324) is **GRANTED** insofar as it seeks disposition of pending motions prior to trial. The Motion is **DENIED** insofar as it seeks a ruling within three days of filing.

Summary Judgment

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. *Clark v.Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991). When a moving party has discharged its burden, the nonmoving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a

genuine issue for trial. *Celotex Corp. v. Catrett*, 477U.S. 317, 324 (1986).

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the nonmovant, *Kev West*, 987 F.2d 723, 726 (11th Cir.1993), and resolve all reasonable doubts in that party's favor. Spence v. Zimmerman, 873 F.2d 256, 257 (11th Cir.1989).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. *Augusta Iron and Steele Works v. Employers Insurance of Wausau*, 835 F.2d 855, 856 (11th Cir.1988). It must be emphasized that the mere existence of some alleged factual dispute will not defeat an otherwise properly supported summary judgment motion. Rather, "the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* At 251-52.

All of Plaintiff's claims against Local 318 ("the Local" or "the Union") with the exception of the allegations of the

breach of duty of representation, have been previously dismissed by the Court (Doc. No. 314, filed on February 4, 2000). A union breaches its duty of fair representation only if its conduct is "arbitrary, discriminatory or in bad faith" Vac v. Sipes, 386 U.S. 171, 191 (1967). Plaintiff's claims fail on all criteria. As noted in this Court's previous Order Dismissing Claims and Causes of Action Barred by Federal Law (Doc. 314, filed on February 4, 2000) by electing to challenge his discharge before the Merit System Protection Board, Plaintiff abandoned the remedies available to him and to Local 318. Obviously, Local 318's duty to represent Plaintiff terminated when that act deprived it of the ability to do so. Further, all claims for acts of unfair representation which are alleged to have occurred more than six months prior to the filing of the complaint are statutorialy barred. *Delcostello v. International Brother. of Teamsters,* 462 U.S. 151, 164-165 (1983); 29 U.S.C. 160(b) & 185. The earliest Complaint filed in any of the consolidated cases is may 2, 1997. Consequently, all claims of alleged unfair representation occurring prior to October 2, 1996 must be **DISMISSED.**

Additionally, and alternatively, Plaintiff has simply failed to meet his evidentiary burden. Plaintiff has attempted to prove, by circumstantial evidence, that Local 318, in failing to bring his grievances to successful ends, including arbitration if necessary, was guilty of bad faith, motivated by racial animus, or did so in retaliation for public criticism of the Local. Circumstantial proof of both racial animus and retaliation are

subject to the *McDonnell-Douglas* analytical framework. *Wright v. Southland Corp.*, 183 F.3d 1287, 1305 (11th Cir.1999)(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A Plaintiff may prove a *prima facie* case giving rise to a presumption of discrimination or retaliation if he can prove: (1) that he belonged to a protected class; (2) that he subject to an adverse job decision. (or in the case of a Union, that it unfairly represented him); (3) the employer (or Union) treated similarly situated employees outside his classification more favorably; and (4) that he was qualified to do the job (or in the case of a Union, that he was entitled to representation). See *McDonnell Douglas v. Green*, 411 U.S. 792, 802, (1973). If Plaintiff meets his burden of proving a *prima facie* case he earns the benefit of a presumption that the employer or union acted unlawfully. See *Wright v. Southland*, 187 F.3d at 1291.

Although Moore states that the Union's alleged wrongful acts followed public complaintis about the Local's leadership, he has not met his initial bursen of showing that "in the light of the factual and legal landscape at the time of the Union's actions, its behavior was so far outside a wide range of reasonableness as to be irrational". *Airline Pilots Ass'n. v. O'Neil*, 499 U.S. 65, 67 (1991)(citations and internal quotations omitted.) The Union need not pursue a matter merely because an employee wishes it do so. Yet if the Union's refusal to represent an employee is motivated by bad faith or hostility toward the employee, it has breached its duty of fair representation. *McCollum v. Bolger*, 794 F.2d 602, 611 (11th Cir.1986) *cert. denied.* 479 U.S. 1034 (1987). In order to prove the requisite animus, Moore must show more than

"mere errors in judgment" or that the charges against him were false and that he was fired without cause. *Hines v. Anchor Motor Freight Inc.*, 424 U.S. 263, 372-73 (199) [sic.]. He has not done this. At most he has shown that he made complaints and, thereafter, the Union possibly committed errors or could have taken his grievances farther. Bad faith requires a showing of fraud or deceitful actions. *Young v. United Automobile Workers-Labor Employment & Training Corp.*, 95 F.3d 992 (10th Cir.1996). Negligence, even repeated bumbling, is not enough.

Even if the Court assumes, arguendo, that every union action of which Moore disapproves may be presumed to be wrongful, that presumption vanishes upon the Union's production of a legitimate nondiscriminatory reason for its actions. *Wright v. Southland*, 187 F.3d at 1291. In the instant case, other than a failure to attend a meeting, which was explained by the illness of the chosen representative (and that illness is not contested), the Union has provided evidence of legitimate reasons that it did not pursue all of Plaintiff's grievances through arbitration. Plaintiff has not shown by competent evidence that these proffered reasons are pretextual. The McDonnel-Douglas presumption consequently, "drops from the case." *Id.* Plaintiff has no other grounds on which to proceed. The Union is entitled to summary judgment against Plaintiff Accordingly, the Local 318's Motion for Summary Judgment (Doc. No. 135) is **GRANTED.**

Attorney Fees

Upon due consideration, the Court finds that there is no showing of bad faith in bringing his claims App.

against the Local. Poor judgment alone does not support an award of attorney's fees. *Davis v. Carl*, 906 F.2d 553, 537 (11th Cir.1990). In the absence of bad faith, Rule 11 sanctions should not be awarded against a pro se party, Nesmith v. Marietta Aerospace, 833 F.2d 1489, 1491 (11th Cir.1987).

Accordingly, the Clerk is directed **ENTER JUDGMENT** in favor of Local 318 and **DISMISS** it as a party defendant.

Plaintiff's Counter Motion for Summary Judgment and the Postmaster's Motions and Amended Motions for Summary Judgment

Plaintiff's Counter Motion for Summary Judgment (Doc. No. 198) as subsequently amended and supplemented through the date of this Order is DENIED insofar as it pertains to his claims against Local 318 for the reasons stated in the above ruling on the Union's Motion for Summary Judgment. As to the remainder of Plaintiff's claims, his filings reveal that he is proceeding under a misunderstanding of the concept of de novo proceedings and whether administrative rulings foreclose litigation of issues raised in those proceedings. Plaintiff's arguments proceed from the premise that the rulings of the Merit Systems Protective Board regarding the legality of the initial order requiring him to submit to a mental fitness for duty examination and his entitlement to both reinstatement and compensation are binding upon this Court. Plaintiff is in error. The Postmaster is entitled to the same privilege of trial de novo enjoyed by Plaintiff. *See, Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 474 (1982); *Chandler v. Roudebush*, 425 U.S.

840, 863-864 (1976); *Gergick v. Austin*, 997 F.2d 1237 (8th Cir.1992) *cert. denied*, 511 U.S. 1029 (1994). Plaintiff has not completed his administrative claims before the Equal Employment Opportunity Commission and is not entitled to the benefits of estoppel. *See generally, University of Tenn v. Elliot*, 478 U.S. 788 (1986); *Moore v. Devine*, 780 F.2d 1559 (11th Cir.1986) and *Simpkins v. Runyon*, 5 F. Supp.2d 1347 (N.D. Ga. 1998). In sum, though Plaintiff seeks additional compensation from the remaining Defendant, he may well lose what he has heretofore gained.

Repleading of the Remainder of the Case and Rescheduling of Trial and Pretrial Proceedings

After reviewing the record the Court is convinced that, due to Plaintiff's convoluted method of pleading, the remainder of the case is incomprehensible. It is unfair to Plaintiff, the remaining Defendant and the Court for the case to go to trial on the pleadings filed to date. It is time to start over to allow the parties to reframe the remainder of the case in a comprehensible order. Accordingly, it is hereby **ORDERED:**

(1) Within **ELEVEN (11) DAYS** of the date of this Order, Plaintiff shall file a single new Complaint, encompassing the surviving claims in case nos. 3:97-cv-531-J-20C, 3:97-cv-613J-20C and 3:98-cv-120-J-20C. No additional causes of action shall be plead. The complaint shall comply with the Federal Rules of Civil Procedure and contain:

(a) a short plain statement of the grounds upon which the court's jurisdiction depends;

(b) a short and plain statement of the claim showing that the pleader is entitled to relief;

(c) a demand for judgment for the relief the pleader seeks;

(d) each averment shall be simple, concise and direct;

(e) in all averments of fraud, mistake the circumstances constituting fraud or mistake shall be stated with particularity;

(f) all averments shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances;

(g) each claim founded upon a separate transaction or occurrence and each defense shall be stated in a separate transaction or occurrence.

(i) the averments shall set forth all materials statements of time and place.

(j) Plaintiff shall, as possible, avoid repetition and draft the complaint with attention to chronology of events.

(2) The remaining Defendant shall have **TWENTY (20) DAYS** from receipt of the Amended Complaint to respond with an Answer or Motion to Dismiss;

(3) No additional discovery will be allowed without further order of this Court upon a showing of good cause;

(4) the Case Management Order (Doc. No. 212, filed on January 1, 1999) is hereby **AMENDED AS FOLLOWS:**

(a) dispositive motions shall be filed on or before the close of business on **May 30, 2000;**

(b) the Pretrial conference is rescheduled for **Friday, September 1, 2000, at 2:30 P.M.** in Courtroom No. 1 on the Fifth Floor of the United Statres Courthouse, 311 West Monroe Street, Jacksonville, Florida;

(c) the Pretrial Stipulation must be filed before 5:00 PM on **August 25, 2000;** and

(d) this case is set for trial in the trial term commencing **Monday, October 2, 2000, at 9:30 A.M.**

Other Pending Motions

1. Defendant Postmaster's Motion for Summary Judgment (Doc. No. 170) and Amended Motion for Summary Judgment (Doc. No. 275) are **MOOT** inasmuch as this Order requires Plaintiff to replead his case.

2. Plaintiff's Counter Motion for Summary Judgment (Doc. No. 198) as amended and supplemented through the date of this Order is **MOOT** insofar as it pertains to suits against any party other than Local 318.

3. Plaintiff's Motion to Stay Court Order (Doc. No. 316, part 1) is **DENIED.** The Orders referred to in that Motion are interlocutory and not appealble at this time;

4. Plaintiff's Motion for Findings of fact and Conclusions of Law (Doc. No. 316, part 2) is **DENIED;**

5. Plaintiff's Motion to stay Court Order (Doc. No. 317, part 1, filed on February 10, 2000) is **DENIED;**

6. Plaintiff's Motion for Findings of Fact and Conclusions of Law (Doc. 317, part 2) are **DENIED;**

7. Plaintiff's Motion to Stay Trial and Proceeding (Doc. No. 327) is **DENIED;**

8. Plaintiff's Motion to Disqualify Judge Schlesinger and Magistrate Judges Corrigan and Steele allege no reasons for Plaintiff's conclusions of bias are based other than each judge has ruled against him. The factual basis, of each the Motion is insufficient and the Motions (Doc. Nos. 328, 329 & 330) are **DENIED;**

9. Plaintiff's Motion for Cause and Clarification (Doc. No. 332) is **DENIED;** and,

10. Plaintiff's Motion to Strike Defendant Henderson's Notice Pendency of Other Actions (Doc. No. 333) is **DENIED.**

Plaintiff's Objections

Upon review, the Court finds that the Magistrate Judge's Order filed on January 28, 2000 (Doc. No. 307) is neither clearly erroneous nor contrary to law. Accordingly the objections (Doc. No. 311) are **OVERRULED** and the Order stands as entered.

Plaintiff's Objections to the notices of clarification

(Doc. No. 335) **are MOOT.**

DONE AND ENTERED at Jacksonville, Florida, this 2 day of March, 2000.

s/ Harvey E. Schlesinger
United States District Judge

ANDREW P. MOORE, II, Plaintiff v. WILLIAM J. HENDERSON, POSTMASTER GENERAL and SUCCESSORS in his official capacity, U.S. POSTAL SERVICE; LOCAL 318, NATIONAL POSTAL MAILHANDLERS UNION, Defendants.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Consolidated Case: Nos.
3:97-cv-531-J-20C
3:97-cv-613-J-20C
3:98-cv-120-J-20C
3:98-cv-393-J-20A

FILED MAR. 3, 2000, CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FL.

DISPOSITION: JUDGMENT ENTERED

COUNSEL: Andrew P. Moore, II, Pro Se, proceeded by and on behalf of himself as Plaintiff.

Reginald Luster, Asst. U.S. Attorney, Lorenzo Cobb, Attorneys for Defendant Postmaster General.

Tobe Lev, Eagan Lev, & Siwica, Attorneys for Local 318

JUDGE: BEFORE: U.S. DISTRICT JUDGE HARVEY E. SCHLESINGER, presiding District Judge.

JUDGMENT: BY U.S. DISTRICT JUDGE HARVEY E. SCHLESINGER, presiding District Judge.

JUDGMENT IN A CIVIL CASE

____ **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Order entered on March 2, 2000, Plaintiff, Andrew P. Moore, II, shall take nothing against Defendant, Local 318, National Postal Mailhandlers Union, and the Local 318, National Postal Mailhandlers Union is dismissed as a party defendant.

Date: March 3, 2000

Sheryl L. Loesh
Clerk

s/ Jane E. Cummings
(By) Deputy Clerk

**THE SEVENTH AMENDMENT
OF THE CONSTITUTION OF THE UNITED STATES.**

In Suits of commom law, where the value in controversy shall exceed twenty dollars, **the right to trial by jury shall be preserved,** and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. [emphasis supplied]

**THE FIFTH AMENDMENT (DUE PROCESS CLAUSE)
OF THE CONSTITUTION OF THE UNITED STATES.**

No person shall be ... deprived of life, liberty, or property without due process of law.

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28 U.S.C. 1291.
FINAL DECISIONS OF DISTRICT COURTS.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the federal Circuit shall be limited to the jurisdiction prescribed in sections 1292(c) and (d) and 1295 of this title.

(Added June 25, 1948, ch. 646, 62 Stat. 929; amended Oct. 31, 1951, ch. 655, 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, 12(e); 72 Stat. 348; April 2, 1982, Pub. L. 97-164, 124, 96 Stat. 36.)

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28 U.S.C. 1651. WRITS

(a) The Supreme court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(Added June 25, 1948, ch. 646, 62 Stat. 944; amended May 24, 1949, ch. 139, 90, 63 Stat. 102.)

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28 U.S.C. 2106. DETERMINATION.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

FRAP 4(a) 7. APPEAL AS OF RIGHT—WHEN TAKEN.

A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the federal Rules of Civil Procedure.

FED.R.CIV.P. 21. (In relevant part).
SEVERANCE OF CLAIMS.

Any claim against a party may be severed and proceeded with separately.

FED.R.CIV.P. 38(a)(b). JURY TRIAL OF RIGHT.

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by (1) serving upon the other parties a demand therefore in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). **Such demand may be indorsed upon a pleading of the party.** [Emphasis Added].

FED.R.CIV.P. 39(a). TRIAL by JURY.

(a) BY JURY. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. **The trial of all issues so demanded shall be by jury**, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States. [Emphasis Added].

FED.R.CIV.P. 56(e) (in relevant part).
DEFENSE REQUIRED.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. **If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.** [Emphasis Added].

FED.R.CIV.P. 58. ENTRY OF JUDGMENT.

Subject to the provisions of Rule 54(b): (1) upon a general verdict or a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

FED.R.CIV.P. 60(b)(3)(4) (in relevant part).
RELIEF FROM JUDGMENT OR ORDER.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (3) **fraud** (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) **the judgment is void.** [Emphasis Added]

ANDREW P. MOORE, II, Plaintiff v. WILLIAM J. HENDERSON, POSTMASTER GENERAL and SUCCESSORS in his official capacity, U.S. POSTAL SERVICE; LOCAL 318, NATIONAL POSTAL MAILHANDLERS UNION, Defendants.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Consolidated Case: Nos.
3:97-cv-531-J-20C
3:97-cv-613-J-20C
3:98-cv-120-J-20C
3:98-cv-393-J-20A

FILED FEB. 3, 2000, CLERK, U.S. DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FL.

COUNSEL: Andrew P. Moore, II, Pro Se, proceeded by and on behalf of himself as Plaintiff. Maxie Broome, Jr. [term 11/06/97] and Earl M. Johnson, Jr. [term 07/17/98], former Attorneys for Plaintiff Moore.

Reginald Luster, Asst. U.S. Attorney, Lorenzo Cobb, Attorneys for Defendant Postmaster General.
Tobe M. Lev, Eagan Lev, & Siwica, Attorneys for Defendant Local 318.

JUDGE: BEFORE: U.S. DISTRICT JUDGE HARVEY E. SCHLESINGER, presiding District Judge.

PLAINTIFF'S RESPONSE & OBJECTIONS TO MAGISTRATE JUDGE'S ORDER FILED JANUARY 28, 2000

COMES NOW the Plaintiff, and hereby responds and objects to Court Order by Magistrate Judge John E. Steele filed January 28, 2000, and as grounds, therefore states:

THE MAGISTRATE JUDGE'S
ORDER CONTAINS CLEAR ERROR

1. On February 2, 2000, Plaintiff received an Order issued by Magistrate Judge Steele containing a list of pending motions for summary judgment and related pleadings filed by the parties as well as a Summary Judgment Notice. [Exhibit 1].

2. Plainitff objects to said Order on the grounds that it contains clear error and is confusing for the following reasons:

THE ORDER EXCLUDES
PLAINTIFF'S COUNTER-MOTION FOR SUMMARY
JUDGMENT AND OTHER RELATED PLEADINGS
PENDING BEFORE THIS COURT

3. The order excludes Plaintiff's "Notice of Filing Original Depositions" filed November 12, 1998: Depositions of Thomas Hopper, Ward Flick, Stephen Glaser, Lawrence Sapp, Ray Grow, Susie Gibson #1, Susie Gibson #2, Linda Wallace, and Morris Altman. [Exhibit 2].

4. The Order excludes the following depositions filed on December 7, 1998: George Martin and Francis Lokietek.

5. The Order excludes:

a) "Plaintiff's Opposition And Counter Motion For Summary Judgment To Defendant Local 318 Motion For Summary Judgment And Defendant Runyon's Motion And Memorandum Of Law In Support Of Motion For Summary Judgment" filed December 7, 1998.

b) "Plaintiff's Supplement To Motion And Counter For Summary Judgment filed September 30, 1999.

c) "Plaintiff's Opposition To 'Defendant Henderson's Frivolous Motion For Summary Judgment' And 'Memorandum Of Law In Support Of Defendant Henderson's Amended Motion For Summary Judgment'" filed October 4, 1999.

THE ORDER IS CONFUSING

6. On page 3 of the Order, it states:

"Plaintiff's Motion for Leave to File Supplemental Pleadings is (Doc. No. 274) is DENIED insofar as it seeks permission to file pleadings and GRNATED insofar as it seeks permission to file the following documents which the Clerk has already placed in the file:" Magistrate Steele then appears to misidentify Plaintiff's pleading, "Plaintiff's Supplement To Motion And Counter For Summary Judgment" filed September 30, 1999 by stating:

"document titled Supplemental to Motion for Leave to File Suppmental Pleadings" (Doc. 278, filed on September 30, 1999)" ..... The Motion for Leave to Supplement is MOOT insofar as it requests leave to file any additional memorandum or evidence in response to Local 318's Motion for Summary Judgment or

Defendant Henderson's Amended Motion for Summary Judgment as required by the above Summary Notice".

7. Plaintiff submits that he has never filed any such "document" on September 30, 1999, hence, based on such confusion, to the extent that the Order denies "Plaintiff's Supplement To Motion And Counter Motion For Summary Judgment" filed September 30, 1999 as well [as] all pleadings and documents previously filed by Plaintiff that is noted in this Respo[n]se but were excluded in the Order, Plaintiff objects to the Order on the grounds that it is unduly & substantially prejudicial and damaging to the claims in his lawsuits. To the extent that the "MOOT" ruling in the Order in essence denies any of Plaintiff's motions for summary judgment or related pleadings, Plaintiff objects on the same previous grounds.

PLAINTIFF HAS ALREADY RESPONDED TO BOTH DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

8. Plaintiff has already responded to the Defendants' motions for summary judgment, hence he is confused as to why a Summary Judgment Notice was issued at such late date & time: On December 7, 1998, Plaintiff responded to both Defendants' motion for summary judgment ("Plaintiff's Opposition And Counter Motion For Summary Judgment To Defendant Local 318 Motion For Summary Judgment And Defendant Runyon's Motion And Memorandum Of Law In Support Of Motion For Summary Judgment" filed December 7, 1998). On October 4, 1999, Plaintiff responded to Defendant Runyon/Henderson's amended motion for summary judgment ("Plaintiff's Opposition To Defendant Henderson's Frivolous Motion For

Summary Judgment' And 'Memorandum Of Law In Support Of Defendant Henderson's Amended Motion For Summary Judgment") filed October 4, 1999.

DEFENDANT RUNYON/HENDERSON
FAILED TO RESPOND TO PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT AND SUPPLEMENT
TO MOTION AND COUNTER

9. Plaintiff submits and the record reflects that Defendant Runyon/Henderson **failed to respond** to "Plaintiff's Motion For Summary Judgment" filed November 13, 1998, and **failed to respond** to "Plaintiff's Supplement To Motion And Counter For Summary Judgment" filed September 30, 1999. Hence, in essence it admits to them.

DEFENDANT LOCAL 318 FAILED
TO RESPOND TO PLAINTIFF'S SUPPLEMENT TO
MOTION AND COUNTER FOR SUMMARY JUDGMENT

10. Plaintiff submits and the record reflects that Defendant Local 318 did respond to "Plaintiff's Motion For Summary judgment" filed November 13, 1998, however, Defendant Local 318 **failed to respond** to "Plaintiff's Supplement To Motion And Counter For Summary Judgment" filed September 30, 1999. Hence, in essence it admits to it.

11. Plaintiff certainly hope that this court considers the important implications as noted in the three preceding averments when rendering its decisions regarding the parties' motions for summary judgment.

WHEREFORE, based on the foregoing, Plaintiff objects to the magistrate judge's Order filed January

28, 2000, and hereby requests a de novo review and determination by the district judge.

DATE: FEBRUARY 3, 2000

s/ Andrew P. Moore, II
Andrew P. Moore, II, Pro Se
PLAINTIFF
2040 Wells Road Apt 13F
Orange Park, FL. 32073-2212
(904) 276-0799

* * * * * *